In the Supreme Court of Bangladesh

High Court Division

(Special Original Jurisdiction)

Present:
Mr. Justice Md. Abu Zafor Siddique

Writ Petition No.5556 of 2014

In the matter of:

Shakwat Hossain Bhuiyan

…….Petitioner.

-Versus-

Bangladesh and others.

……..Respondents.

Mr. Qumrul Haque Siddique, Senior Adv. with

Mr. Satya Ranjan Mondal with

Ms. Rasida Chowdhury, Advocates

……for the petitioner.

Mr. Shafiq Ahmed, Senior Advocate with

Mr. Md. Nurul Islam Sujan, Advocates

……..for the respondent No.7.

Mr. Aminur Rahman Chowdhury, DAG

……..for the respondent Nos.8 and 9.

No one appears.

……..for the respondent No.10.

Heard on:25.02.2018, 26.02.2018, 27.02.2018.

Judgment on 01.03.2018

Md. Abu Zafor Siddique,J:

In an application under Article 102(2)(b)(ii) of the Constitution of the People's Republic of Bangladesh, Rule was issued calling upon the respondents in the following terms;

> *"Let a Rule Nisi be issued calling upon the respondents to show cause as to under what authority the respondent No.7 is holding the post of Member of Parliament (MP) for the constituency of Feni-2 and why the said seat of the Member of Parliament (MP) for the said constituency of Feni-2 shall not be declared vacant and/or pass such other or further order or orders as to this court may seem fit and proper."*

While issuing the Rule this Court also issued the following directions;

> *"(a) The jail authorities being the Inspector General of Prison (IG Prison) and the senior Jail Super, Chittagong Central Jail, Chittagong, (respondent Nos.8 and 9) were directed "to submit a report on the service of the period of sentence in Jail by respondent No.7 along with relevant record /file." And*
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> *(b) Editor of the Daily Prothom Alo (respondent No.10) was "directed to explain his position and also the sources and authenticity of the*

news item সাজা কম খেটে, বেরিয়ে যান সাংসদ. Published in the Daily Prothom Alo dated 10.05.2014".

The respective respondents contested the rule by filing affidavit in oppositions.

Subsequently the matter was taken up by a Division Bench comprising by their Lordships Mr. Justice Md. Emdadul Hoque and Mr. Justice FRM Nazmul Ahasan. The Court heard the matter for 4(four) consecutive days and fixed 06.12.2016 for judgment. On the date the Court passed split judgments wherein Mr. Justice Md. Emdadul Hoque made the Rule absolute with consequential directions, wherein Mr. Justice FRM Nazmul Ahasan discharged the rule. As their Lordships passed dissenting order the matter was referred to the Hon'ble Chief Justice for order. The Hon'ble Chief Justice thereafter Constituted this bench as 3rd Judge to hear and dispose of the matter.

While disposing the instant writ petition both the lordships elaborately stated the facts in their respective judgments. As such I am of the view that elaborate facts need not be re-attriated again. However, for the disposal of the Rule by this Court the short fact is that the petitioner is a voter of constituency number 266 of Feni-2. The petitioner is a conscious citizen of the country. The respondent No.7 contested in the Parliamentary

Election in 2014 and elected as a Member of the Parliament. The Election Commission by gazette notification notified the same. As per the petitioner the respondent No.7 has made false statement in the affidavit filed before the Election Commission as regards to his criminal record for taking part in the National Election. The main allegation as made by the petitioner is that the respondent No.7 escaped the sentence awarded by a Court of law by way of committing fraud. The conduct of the respondent No.7 is against the provision of Article 66 (2)(d) of the Constitution of the People's Republic of Bangladesh. As such the respondent No.7 shall be disqualified to contest or to be elected as Member of Parliament.

The respondent No.7 entered appearance and contested the Rule by filing affidavit in opposition. The contention of the respondent No.7 is that; the petitioner filed this writ petition before this Court as one of the political rivals of the respondent No.7. The petitioner was the councilor candidate of the Feni Pourashava when the respondent No.7 was elected Mayor of the Feni Pourashava, but the petitioner defeated to be elected as councilor of the said Pourashava and thereafter, conflict arises in between the petitioner and the respondent No.7. Once upon a time, the petitioner was one of the close associate of the

respondent No.7 and when the respondent No.7 was inside the Jail in a falsely implicated Criminal Case for the alleged recovery of unauthorized arms from his possession and was convicted and sentenced, and the writ petitioner was the tadbirkar of the said Criminal Case up to the Appellate Division of the Supreme Court of Bangladesh. Since the petitioner is an interested person and political rival of the respondent No.7 and brought the present writ petition with malafide intention in the name of public interest litigation after 8 (eight) years of release of the respondent No.7 from Jail and became elected as Mayor of Feni Pourashava and then elected as a Member of Parliament. It has been further contended that the respondent No.7 did not serve the full sentence by way of committing fraud is not at all correct; that the respondent No.7 has been released from the Jail custody as per provision of the Jail Code by serving the full sentence awarded against him. The respondent No.7 did not commit any wrong in filing the affidavit before the Returning Officer for participating in the National Election for the Member of Parliament and he was released from Jail after completion of the period of sentence as per provision of Jail Code and that the respondent No.7 did not suppress anything in his aforesaid affidavit. The Metropolitan Sessions Judge, 4th Court,

Chittagong vide judgment and order dated 16.08.1999 convicted the respondent No.7 in Special Tribunal Case No.757 of 1999 arising out of Doublemuring Police Station Case No.29 dated 22.03.1992 under section 19A and (f) of the Arms Act and sentenced him to suffer rigorous imprisonment for a period of 10(ten) years under section 19A of the said Act and further sentenced for a period of 7(seven) years under section 19(f)of the said Act concurrently. After judgment dated 16.08.1999, the respondent No.7 surrendered before the Court on 14.09.1999 and preferred appeal being Criminal Appeal No.2369 of 2000 before the High Court Division of the Supreme Court of Bangladesh. The High Court Division dismissed the appeal vide judgment and order dated 02.05.2001 and against that the respondent No.7 preferred Criminal Petition for Leave to Appeal No.107 of 2001 before the Appellate Division of the Supreme Court which was dismissed on 27.02.2002. Against the said judgment dated 27.02.2002, the respondent No.7 filed Criminal Review Petition No.18 of 2002 and the said Review Petition was dismissed on 26.06.2004. The respondent No.7, after dismissal of the review Petition served in the custody and after serving in the custody he has been released from the Chittagong Central Jail on 01.12.2005 as per the Jail Code on the basis of remission.

The respondent No.10 ‘the daily Prothom Alo’ in paragraph No.6 of its affidavit-in-compliance dated 07.07.2014 annexing the photocopy of snap shot of remission ticket stated that ‘the reporter took some snaps of the relevant parts of Koyed Register where necessary information lies as evidence of his news’ which shows that the respondent No.7 has been released from Jail on the basis of remission on 01.12.2005. The respondent No.7 after releasing from the Jail contested in the Pourashava election and was elected as Mayor of Feni Pourashava on 18.01.2011. Subsequently, he has contested in the National General Election and he has been elected as a Member of Parliament on 05.01.2014 from Feni-2, Constituency No.266. Hence none appeared for respondent No.10. The respondent Nos.8 and 9 also filed affidavit in compliance pursuant to the direction given at the Rule issuing order.

Mr. Qumrul Haque Siddique, the learned senior Advocate appearing along with Mr. Satya Ranjan Mondal and Ms. Rashida Chowdhury, the learned Advocates on behalf of the petitioner submits that the respondent No.7 is disqualified to be elected as Member of the Parliament because of moral turpitude in this connection. He referred the provision of Article 66(2)(d) of the Constitution of the Republic. The main contention as

raised by the learned counsel is that the respondent No.7 is disqualified for making false statement punishable under Article 73 of the RPO. He submits that because of the false declaration the respondent No.7 is disqualified to be elected as per Article 12 (1)(d) of the RPO for offences under Article 73 of the RPO and effective legal measure be taken against the respondent No.7 for his corrupt practice under Article 73(3)(a) of the RPO for giving false statement in the affidavit. He further submits that the respondent No.7 has an obligation under Article 12, clause (3b), sub-clause (b & C) of RPO, 1972 to submit true information as regards present and past criminal records of the candidate in the affidavit but he did not honestly disclosed all the material and true information in the affidavit, which is clear violation of the above mentioned Article 12 (3b) (b & c) of the RPO, 1972. Hence, holding the present post by the respondent No.7 is liable to be declared illegal. He submits that this writ petition is being filed by the petitioner in the nature of quo warranto and he made out a positive case in this regard. He submits further that this petition by way of quo warranto is very much maintainable as per the provision of the Constitution itself and thus the respondent No.7 is not liable to hold the office of the Member of Parliament. He further submits that this is a fit

case of quo warranto in public interest which requires interference by this Court.

Mr. Siddique further submits that the respondent No.7 should be declared as disqualified because, under Article 63(1) (b & c) of the RPO, 1972 the High Court Division has the authority to declare the election of any returned candidate to be void if, it is satisfied that the returned candidate was not, on the nomination day, qualified for, or was disqualified from, being elected as a member or the election of the returned candidate has been procured or induced by any corrupt and illegal practice. He next submits that the respondent No.7 after failing in all the legal steps up to the Hon'ble Appellate Division of the Supreme Court preferred Criminal Appeal No.1409 of 2006 in this Court on 17.05.2006 and subsequently released from the Jail custody on 01.06.2006. As he was convicted and sentenced to suffer rigorous imprisonment for 10 years and 7 years concurrently and he surrendered on 14.09.2000 before the trial Court and sent to Jail custody and thereafter, he was released on bail on 01.06.2006. Thus, he was in jail for 5 years 8 months and 19 days and if, he got the highest remission as per Jail Code, 1894 i.e. 60 days per year he will get remission with the sentenced 10 years from 600 days and in this way he has to be in the custody

about 916 days more, which has not yet been served out. He further submits that according to section 568 of the Jail Code of 1894 the petitioner will not get any remission more than one third of the entire sentence. In support of the above submission, Mr. Siddique referred to the case of THE KING V. SPEYER AND THE KING V. CASSEL before the KING'S BENCH DIVISION, Judgment dated 16, 17 November, 1915, Hussain Mohammad Ershad vs. Zahidul Islam Khan and others, reported in 21 BLD 142 (AD) 2001, Habibur Rahman @ Raju vs. the State, reported in 20 BLD (HCD)117 (2000), Abdur Rob mia (Md) vs. District Registrar and others reported in 4 BLC (AD) 8 (1999), Dangar Khan and others vs. Emperor reported in AIR 1923 Lahor 104, Chandgi Ram Thakar Dass vs. Election Tribunal and Asstt. Development Commissioner for Panchayat Election, Delhi and others, reported in AIR 1965 PUNJAB 433 (V 52 C 136) (AT DELHI) and Risal Singh V. Chandgi Ram and others, reported in AIR 1966 PUNJAB 393.

Mr. Shafiq Ahmed the learned Senior Advocate appearing along with Mr. Nurul Islam Sujon the learned Advocate on behalf of the respondent No.7 submits that the writ petition is not maintainable as the petitioner is one of the political rival of the respondent No.7 who was a Councilor

candidate of the Feni Pourashava when the respondent No.7 was elected as Mayor of the said Pourashava and thereafter, conflict arises between the petitioner and respondent No.7 and since the petitioner is an interested person and political rival of the respondent No.7, writ petition brought with malafide intention after 8 years of the release of the respondent No.7 from the Jail and became elected as Mayor of Feni Pourashava and thereafter, elected as a Member of Parliament. He further submits that the respondent No.7 did not commit any fraud in order to get remission from the Jail and he has been released from the Jail custody as per provision of the Jail Code after serving the sentence awarded against him and on remission. Thus, the question raised by the petitioner is a disputed question of fact which is brought with malafide intention. He further submits that a news which has been published in the daily Prothom Alo and the allegation made by the petitioner and the respondent Nos.8 and 9 that he has not served out the entire period of sentence is a matter of calculation about the period of Jail custody of the respondent No.7 and all are disputed questions of fact which cannot be resolved in the writ petition. He also submits that the respondent No.7 did not face any criminal case so far known to him other than the criminal case in which he was convicted and

preferred appeal and it was upheld by the Appellate Division and the respondent No.7 released from jail custody on 01.12.2005. Thus, this matter is also a disputed question of fact which cannot be resolved in the writ petition. Mr. Ahamed further submits that the respondent No.7 did not commit any wrong in filing the aforesaid nomination paper before the Returning Officer i.e. for the election of the Member of Parliament and he was released from jail after served out his sentence as well as on remission as per provision of Jail Code and the respondent No.7 did not suppress anything in his aforesaid affidavit. Mr. Shafiq Ahamed submits that the respondent Nos.8 and 9 could not produce the history ticket in which the blood donation of the respondent No.7 was recorded and the report submitted by the respondent Nos.8 and 9 is not a complete report without placing the proof of blood donation which was recorded in the history ticket. Thus, on the basis of the aforesaid report, which is a disputed one, cannot be said that the respondent No.7 did not serve out the entire period which is claimed by the petitioner and the calculation of the remission awarded by the respondent No.7 by donation of blood is a disputed question of fact, as the respondent No.7 claimed that he has served out entire period of sentence with remission and the respondent Nos.8 and 9 claimed

that he did not served out the entire period of sentence is a highly disputed question of fact which cannot be resolved in the writ petition. In support of his contention he relied upon the decision reported in 31 DLR (AD) 303. He further submits that the present case does not come within the purview of the Public Interest Litigation (PIL) as there are some fundamental principles are to be followed in a case of PIL. But in the case in hand the petitioner mainly raises his personal interest rather than public. In support of contention he relied upon the decision reported in 18 BLC (AD) 116. Apart from that he further submits that as per Article 66(2) (d) of the Constitution of the Republic puts bar if the offence involves the question of Moral Turpitude but the offence as alleged does not comes within the definition of Moral Turpitude in any manner. In support of his contention he relied upon the decision of Hussain Mohammad Ershad Case. Mr. Ahamed submits that the rule is liable to be discharged. In support of the above submission Mr. Ahamed referred to the Case of National Board of Revenue Vs. Abu Syed Khan and others reported in 18 BLC (AD) 116, AFM Shah Alam Vs. Mujibul Huq & ors. reported in 41 DLR(AD) 68, Farid Mia (Md) Vs. Amjad Ali (Md) alias Mazu Mia and ors. reported in 42 DLR(AD) 13, Kurapatia Maria Das Vs. M/S

Doctor Ambedker Seva Samajan and others. (in Civil Appeal No. 2617 of 2009 arising out of SLP (civil) No. 15144 of 2007) Judgment dated 17th April, 2009, Supreme Court of India and New India Tea Company Ltd. Vs. Bangladesh and others reported in 31 DLR (AD) 303 (1979).

Mr. Aminur Rahman Choudhury, the learned Deputy Attorney General appearing on behalf of the Respondent No. 8 and 9 opposes the Rule and submits that the instant writ petition itself is not maintainable because of the personal interest of the petitioner in question. He submits that the petitioner in the case in hand raises serious disputed question of fact which cannot be resolved in a summary proceedings under Article 102 of the Constitution of the Republic. He further submitted that the questions as raised by the petitioner needs to be addressed only by taking elaborate evidence as much as the jail authority themselves admitted that there are defective papers submitted by the petitioners which cannot be relied upon in any manner. He lastly submits that the rule is liable to be discharged.

I have perused the application under Article 102 of the Constitution of the People's Republic of Bangladesh, rule issuing order, affidavit in opposition, supplementary affidavits, affidavit in reply as well as affidavit in compliance. I have also

perused the different papers and documents annexed with the writ petition as well as time to time supplied to this court as directed. I have also heard the learned counsels for the contesting parties, perused the decisions as referred to as well as the provisions of law. On perusal of the same it appears that the petitioner filed the writ petition as a bonafide citizen for public interest in the nature of writ of quo warranto. The petitioner has challenged the holding of the office of Member of Parliament by the respondent No.7 without lawful authority as he is being elected in violation of the provision of Representative Peoples Order (RPO) and ultimately in violation of the provisions of the Constitution of the Republic. In course of arguments both the parties raises numerous issues as well as a series of documents has been filed to justifying the respective claims.

The main contention as it appears from the writ petition is that the respondent No.7 was convicted under section 19A and (f) of the Arms Act and sentenced to suffer rigorous imprisonment for a period of 10(ten) years under section 19A of the said Act and further sentenced for a period of 7 years under section 19(f) of the said Act concurrently in Special Tribunal Case No.757 of 1999 passed by the judgment dated 16.08.1999. Thereafter, the respondent No.7 surrendered before the Court on

14.09.1999 and preferred appeal being Criminal Appeal No.2369 of 2000 before the High Court Division which was dismissed on 02.05.2001. Against which the respondent No.7 preferred Criminal Petition for Leave to Appeal No.107 of 2001 which was also dismissed on 27.02.2002. Against that, a Criminal Review Petition No.18 of 2002 was filed and the same was dismissed on 26.06.2004.

The respondent No.7 thereafter contested the local government election in the year 2011 and he was elected as Mayor of Feni Pourashava. Thereafter, he was elected as a Member of the Parliament and presently holding the office of the same. On the basis of a report in a news paper that the respondent No.7 escaped certain jail term the instant writ petition was filed.

The allegation as brought against the respondent No.7 is that the respondent No.7 was convicted and sentenced to suffer rigorous imprisonment for 10 years and 7 years concurrently meaning that he had to suffer 10 years in Jail, i.e. the respondent No.7 had suffered both in custody and Jail for a total period of 5 years 7 months and 21 days and the duration of period of conviction of the respondent No.7 was reduced to 1 year 6 months and 17 days as per news report. In that context, it

appears that the respondent No.7 became free almost 2 years and 10 months long before of his actual exit date from Jail, i.e. before finality of serving out his punishment, the respondent No.7 came out of the jail and contested the national election in 2014 from Feni-2 Constituency and as per Article 66(2)(d) of the Constitution of the People's Republic of Bangladesh, a person shall be disqualified for election as a Member of Parliament who has been on conviction for a Criminal offence involving moral turpitude, sentenced to imprisonment for a term of not less than two years, unless a period of five years has elapsed since his release and before serving out the punishment and thereby elapsing of subsequent five years, the respondent No.7 contested the national election and making false statement in the affidavit of the nomination paper and as such he may be declared disqualified for election as per Article 12(1)(d) of the RPO for offences under Article 73 of the RPO and holding the present post by the respondent No.7 is unlawful and may be declared illegal.

On the other hand, the respondent No.7 denied the allegation made in the writ petition stating that he has been released from Jail on 01.12.2005 after serving the sentence and getting proper remission from the Jail authority. This contention

of the respondent No.7 is particularly supported by the respondent No.10 which published a news with a snap shot of the register of Chittagong Jail authority signed by the Senior Jail Super, Chittagong Central Jail that, মুল সাজা রেয়াত প্রথায় ভোগ শেষে মুক্তি দেওয়া হলো রেয়াত ০১-০৬-২০১৭ (স্বাক্ষর অস্পষ্ট) ১/১২/২০০৫ সিনিয়র জেল সুপার চট্রগ্রাম কেন্দ্রীয় কারাগার।'' but this fact is denied by the respondent Nos.8 and 9 in their affidavit-in-compliance. They have stated that the respondent No.7 was released from jail on bail on 01.06.2006 in Criminal Appeal No.1409 of 2006 from the High Court Division. Mr.Sagir Mia, Senior Jail Superintendent, Chittagong Central Jail submitted that, ''কারাগার হতে সাজা কম খেটে বেরিয়ে যাওয়ার কোন সুযোগ নেই। বর্নিত কয়েদি নিজাম হাজারী অত্র কারাগার হতে সাজা ভোগরত অবস্থায় মহামান্য আদালতের আদেশ মোতাবেক জামিনে মুক্তি লাভ করেন।'' and he begs apology for his earlier re-joinder (প্রতিবাদ-লিপি) that the respondent No.7 was released on 01.12.2005 fro the jail on remission.

From the report dated 30.06.2016 filed by the respondent No.9 that, ''কয়েদি নং ৪০১৪/এ জনাব নিজাম উদ্দিন হাজারী সম্পর্কিত চট্রগ্রাম কেন্দ্রীয় কারাগারের ভর্তি রেজিষ্টার নিরীক্ষা করে দেখা যায়, উক্ত পৃষ্টায় নীচের কোনায় একটি বড় অংশ ছেড়া কয়েদি ভর্তি রেজিস্টারের ২৫ নং কলামে যেখানে বন্দি মুক্তি সংক্রান্ত তথ্য লিপিবদ্ধ করা হয় সেই অংশটুকুই ছেড়া (ছায়ালিপি সংযুক্ত ঙ)।''

ভর্তি রেজিস্টারের মুক্তি সংক্রান্ত তথ্য লিপিবদ্ধ সংক্রান্ত কলামের অংশটুকু ছেড়া থাকা, ভর্তি রেজিস্টারে রেয়াত সংক্রান্ত তথ্য ঘষামাজা থাকা, মুল সাজা রেয়াত প্রথায় মুক্তি দেয়া হলো মর্মে ভুয়া এন্ট্রি ইত্যাদি বিষয়গুলো পর্যবেক্ষন করে প্রতীয়মান হচ্ছে কারাগারের কোন দুষ্ট চক্রের মাধ্যমে কোন অবৈধ উদ্দেশ্য /হীন স্বার্থ চরিতার্থ করার মানসে এ মিথ্যা ঘটনা সমুহ সাজানো হয়েছে। জনাব নিজাম উদ্দীন হাজারী ২০১১ সালে পৌরসভা নির্বাচনে আইনগতভাবে মনোনয়ন দাখিলের শর্ত পুরনার্থে ৫ বছর পুর্বে কারা মুক্তির কোন প্রত্যয়ন সংক্রান্ত তথ্য বা নথি যদি কারা কর্তৃপক্ষ বা বিজ্ঞ বিচারিক আদালত কর্তৃক নির্বাচন কমিশনে উপস্থাপিত হয়ে থাকে তবে তা নিরীক্ষণ করার প্রয়োজন রয়েছে এবং তার জন্য একটি সমন্বিত তদন্ত কমিটি গঠনের প্রয়োজনীয়তা বিবেচিত হচ্ছে।''

From Annexure-X dated 09.10.2016, report of the IG Prison it appears that, 'উপরোক্ত সার্কুলার মুলে রক্তদানের বিনিময় কোন কয়েদী আসামীর প্রাপ্ত বিশেষ রেযা.ত সুবিধা বিস্তারিত কারা বিধি ৭৬৭ এর বিধান মোতাবেক বন্দীর রেয়াত কার্ড ও হিস্ট্রি টিকেট রেয়াত প্রদানের কারণ ও প্রাপ্ত রেয়াতের পরিমান উল্লেখ থাকতো। উল্লেখ্য যে, রেয়াত কার্ড ও হিস্ট্রি টিকেট সংরক্ষনের মেয়াদ কারা বিধির ৭৮০(৮) ও ৫৮৮ এর বিধান মোতাবেক ০১(এক) বৎসর। কয়েদী নং ৪১১৪/এ নিজাম উদ্দিন হাজারী এর হিস্ট্রি টিকেট, রেয়াত কার্ড এবং রক্ত দান সংক্রান্ত কোন নথিপত্র চট্রগ্রাম কেন্দ্রীয় কারাগারে খুজে না পাওয়ায় উক্ত বিষয়ে বিস্তারিত তথ্য উদঘাটন করা সম্ভব হয়নি। চট্রগ্রাম কেন্দ্রীয় কারাগারে জনাব নিজাম হাজারীর রক্ত দান সংক্রান্ত কোন তথ্য না পাওয়ায় কারা কর্তৃপক্ষ এ বিষয়ে প্রতিবেদন প্রেরনের জন্য সন্ধানী, চট্রগ্রাম মেডিকেল কলেজ ইউনিট, চট্রগ্রাম বরাবরে পত্র মারফত যোগাযোগ করেন।

সন্ধানী এক পত্রের মাধ্যমে জানায় যে, ১৪-১২-২০০০ খ্রিঃ হতে ১৫-৯-২০০৫ খ্রিঃ পর্যন্ত সময়ের চাহিত রেকর্ড পত্রাদি ১০-১২ বছরের পুরনো বিধায় এবং তাদের কার্যালয় স্থানান্তরের সময় বিনষ্ট হয়েছে বিধায় চাহিত তথ্য প্রদানে অপারগতা প্রকাশ করে দুঃখ প্রকাশ করেছেন। তবে সন্ধানী কর্তৃপক্ষ প্রদত্ত সনদ অস্বীকার করেননি।'

So it appears from the aforesaid report of the respondent Nos.8 and 9 appears that the respondent Nos.8 and 9 admitted that the information record in the admission register was torn and it was done by some dishonest clique and to find out the real fact and it further reveals that there is no existence of history ticket wherein the elaborate information of blood donation of the prisoner is recorded. There is no information about the blood donation in the record of the Chittagong Central Jail. The Sandhani authority also could not produce any record though they did not deny their certificate about the blood donation.

Furthermore Annexure-10, it appears that during his custody in jail from 14.09.2000 to 01.12.2005 respondent No.7 donated blood in total 13 times through the Chittagong Jail authority to the Sandhani, a renowned charitable organization of medical students, and thereby obtained special remission under Code No.765 of the Jail Code, but the respondent No.8 did not count the said special remission. From the certificate dated

06.10.2005 given to the respondent No.7 by Sandhani (Annexure-9) has been annexed with the affidavit in reply of the respondent No.7 to the affidavit-in-compliance of the respondent No.8, a certificate was also given to the respondent No.7 by the Sandhani authority which quoted below :

প্রশংসা পত্র

এই মর্মে প্রত্যয়ন করা যাইতেছে যে, নিজাম উদ্দিন হাজারী, পিতা-জয়নাল আবেদীন হাজারী, আইডি নং-৪১১৪/এ কারান্তরীন থাকাকালীন চট্রগ্রাম কেন্দ্রীয় কারাগারে গত ১৪-১২-২০০০ খ্রিঃ হতে ১৫-৯-২০০৫ খ্রিঃ পর্যন্ত সময়ের মধ্যে আর্ত্তমানবতার সেবায় নিয়োজিত হইয়া চট্রগ্রাম কেন্দ্রীয় কারাগার কর্তৃপক্ষের মাধ্যমে ১৩ (তের) ইউনিট রক্তদান করায় আপনাকে অত্র সংস্থার পক্ষ থেকে দেশ ও জাতির কল্যাণে ভুমিকা রাখায় আন্তরিকভাবে ধন্যবাদ জ্ঞাপনসহ আপনার মঙ্গল ও উজ্জল ভবিষ্যত কামনা করছি।

স্বাক্ষর	স্বাক্ষর
সভাপতি	সাধারন সম্পাদক
চট্রগ্রাম মেডিকেল কলেজ ইউনিট, সন্ধানী	চট্রগ্রাম মেডিকেল কলেজ ইউনিট, সন্ধানী

Article 102 of the Constitution of the People's Republic of Bangladesh runs as follows:

"102.(1) The High Court Division on the application of any person aggrieved, may give such directions or orders to any person or authority, including any person performing any function in connection with the affairs of the Republic, as may be appropriate for the enforcement of any of the fundamental right conferred by part III of this Constitution.

(2) The High Court Division may, if satisfied that no other equally officious remedy is provided by law-

(a) on the application of any person aggrieved, make an order-

(i) directing a person performing any functions in connection with the affairs of the Republic or of a local authority, to refrain from doing that which he is not permitted by law to do or to do that which he is required by law to do ; or

(ii) declaring that any act done or proceeding taken by a person performing functions in connection with the affairs of the Republic or of a local authority, has been done or taken without lawful authority and is of no legal effect; or

(b) on the application of any person, make an order –

(i) directing that a person in custody be brought before it so that it may satisfy itself that he is not being held in custody without lawful authority or in an unlawful manner; or

(ii) requiring a person holding or purporting to hold a public office to show under what authority he claims to hold that office."

Clause (1) and (2) of article 102 of the Constitution show the following features:

(a) Clause (1) of article 102 provides that for enforcement of a fundamental right only a 'person aggrieved' can apply to the High Court Division.

(b) Clause 2(a) provides that for obtaining a remedy in relation to an

action or omission of a public authority only a 'person aggrieved' can apply to the High Court Division.

(c) As opposed to the above noted two clauses, clause (2) (b) (ii) provides that "any person" can apply to High Court Division challenging the lawful authority of a person in holding a public office, if no other efficacious remedy is available to the petitioner provided by other laws."

So it appears that the lawful authority of the respondent No.7 to hold of the public office of the Member of Parliament comes within the purview of Article 102(2)(b)(ii) of the Constitution and under which any person can make an application. Obviously the person may not be aggrieved to challenge the same but any person is competent to do so. But the fundamental principle is that such application is to be a public interest one. In the present case in hand it appears that the petitioner is a local rival of the respondent No.7. In numerous papers and documents it clearly transpires that the petitioner is a political rival of the respondent No.7 and he has personal interest in the present case in hand. The cardinal principle as determined time to time and got endorsement by this Court as well as our Apex Court that a person has to come before a court of law with

clean hand. A person who is seeking remedy is to show his fairness, moral impartiality. It is the duty of the court of law to ensure that there is no personal or malafide intention when an application has been pressed for public interest. As such fairness is very much essential to ensure the rule of law and the establishment of administration of justice. In the present case in hand it is very much clear that the petitioner though pose himself as an aggrieved person with a cause of greater public interest which attracted the principle of public interest but there is a clear deviation from the same because of the personal interest. The petitioner being a political rival and for being personal interest cannot succeeds to press his bigger cause namely public interest litigation.

It is now a well settled proposition of law that if there is efficacious and alternative remedy is available, a writ petition under Article 102 of the Constitution is not maintainable. Admittedly it has been raised whether Article 125 of the Constitution puts a bar in the instant case in hand. Admittedly as per the aforesaid provision of law there is a legal bar questioning the result of the election declared by the commission except following the provisions of RPO. In the present case in hand it appears that the petitioner in the disguise of Article 102 of the

Constitution trying to enforce the provisions of RPO. In the present case in hand it further appears that the question as raised by the petitioner regarding certain declarations made by the respondent No.7 before the Election Commission which is completely a dispute to be resolved by the competent authority as provided in the Represented People Order (RPO). Admittedly there is a provision namely Article 12 of the RPO to deal with the issue as raise herein.

Article 66 2(d) of the Constitution runs as follows;

> *"66. Qualification and disqualification for election to parliament. (1) A person shall, subject to the provision of clause (2), be qualified to be elected as, and to be, a member of parliament if he is a citizen of Bangladesh and has attained the age to twenty five years.*
>
> *(2) A person shall be disqualified for election as, or for being a member of Parliament who –*
>
> *(a)----------(c) ----------(not relevant)*
>
> *(d) has been, on conviction for a criminal offence involving moral turpitude, sentenced for a criminal offence involving moral turpitude, sentenced to imprisonment for a term of not less that two years, unless a period of five years has elapsed since his release."*
>
> *1(dd)----------(not relevant)*
>
> *(2A)---(5) ----------(not relevant)*

So a careful reading a Article 66(2) of the Constitution runs as follows;

> *"Particularly the expression "A person shall be disqualified for election as, or for being a member of Parliament" read with clauses (d) shows that the Constitution contemplates 3 (three) situations about the disqualification of a person, namely- (1) the disqualification acquired before election, (2) the disqualification acquired after election, and (3) disqualification that was acquired before but continues after the election."*

In the present case in hand the it has been argued that the respondent No.7 acquired the disqualification before election but despite that such allegation can be adjudicated following the provisions of the RPO.

The question as relates to the date of release of the incumbent MP from jail and the period of sentenced served out by him has been raised in the present case in hand. I have carefully examined the papers and documents as well as numerous materials submitted before this Court. On careful analyses of the same it appears that a series of disputed questions of fact has been raised while dealing with the said issue. The claim of the petitioner was vehemently opposed by the respondents including the respondent No.7. In course of hearing before this Court numerous affidavits were filed as well as

papers and documents were submitted. So it appears that a serious dispute has been raised regarding the same. The deliberations and the contentions as raised herein clearly shows that the same falls within the established principle of, "Disputed Question of Fact." The contentions as raised by the petitioner and the respondents requires elaborate investigation as well as it also requires examination, as production of evidence and also the question of examination and cross examination of witnesses. As such I am of the view that since serious disputed question of fact has been raised the same cannot be addressed in a summary proceeding under Article 102 of the Constitution of the People's Republic of Bangladesh.

In the case of Abdul Mukit Chowdhury vs. The Chief Election Commissioner & ors reported in 41 DLR 57 wherein it is held,

> *"Examination of Annexure-A which in its turn requires elaborate investigation warranting proofs which is not the function of this court and it may cause prejudice to either party if the same be taken into consideration under summary proceeding. There being a forum namely, the Election Tribunal set up to investigate into facts, we, therefore, restrain ourselves from making ay observation as to whether the same is authentic or otherwise."*

In the case of Farid Mia (Md.) vs. Amjad Ali (Md.) alias Mazu Mia and ors reported in 42 DLR 13 wherein it is held,

> *"Constitution of Bangladesh, 1972-Article 102-In a summary preceding under Article 102 of the Constitution it is not possible to record a finding as to a disputed question of fact.*
>
> *In a quo-warranto proceeding, the exercise of authority is discretionary and, among other things, the court takes into consideration the motive of the person who moves the court.*
>
> *As regards the first ground, it may be stated that if the purpose of the writ petition was only to challenge the election of the appellant on the alleged ground of his being a defaulter then we would have fell no hesitation to declare at once that the writ petition was not maintainable. Indeed, we have already held while rejecting CPSLA No.21 of 1988 (quoted in the affidavit-in-opposition) that "such questions as to disqualification, etc. which are questions of fact are better settled upon evidence which can be done more appropriately before a Tribunal.In the summary proceeding under Article 102 it is not desirable and, more often than not, not possible to record a finding as to a disputed question of fact."*
>
> *The better view would have been to hold that in view of the facts of the case, it was not desirable to*

decide the issue in the writ jurisdiction without consideration of all the evidence-both oral and documentary."

In the case of National Board of Revenue vs. Abu Saeed Khan and others reported in 18 BLC (AD) 116 (2013) wherein it is held,

"Constitution of Bangladesh, 1972-Article 102(2)Public Interest Litigation-The para-meters within which the High Court Division should extend its discretionary jurisdiction in entertaining a PIL.

1. *Before entertaining a petition the Court will have to decide the extent of sufficiency of interest and the fitness of the person invoking the discretionary jurisdiction.*
2. *The court which considering the question of bonafide in a particular case will have to decide as to why the affected party has not come before it and if it finds no satisfactory reason for non appearance of such affected party, it may refuse to entertain the petition.*
3. *If a petition is filed to represent opulent members who were directly affected by the decision of the Government or Public Authority, such petition would not be entertained.*
4. *The expression 'person aggrieved' used in Article 102(1) means not any person who is personally aggrieved but one whose heart bleeds for the less*

fortunate fellow beings for a wrong done by any person or authority in connection with the affairs of the Republic or a Statutory Public Authority.

5. *If the person making the application on enquiry is found to be an interloper who interferes with the action of any person or authority as above which does not concern his is not entitled to make such petition.*
6. *The Court is under an obligation to guard that the filing of a PIL does not convert into a publicity interest litigation or private interest litigation.*
7. *Only a public spirited person or organization can invoke the discretionary jurisdiction of the Court on behalf of such disadvantaged and helpless persons.*
8. *The Court should also guard that its processes are not abused by any person.*
9. *The Court should also guard that the petition is initiated for the benefit of the poor or for any number of people who have been suffering from common injury but their grievances cannot be redressed as they are not able to reach the Court.*
10. *It must also be guarded that every wrong or curiosity is not and cannot be the subject matter of PIL.*
11. *No petitions will be entertained challenging the policy matters of the Government, development works being implemented by the Government,*

Order of promotion or transfer of public servants, imposition of taxes by the competent authority.

12. *The Court has no power to entertain a petition which trespasses into the areas which are reserved to the executive and legislative by the Constitution.*

13. *A petition will be entertained if it is moved to protect basic human rights of the disadvantaged citizens who are unable to reach the Court due to illiteracy or monetary helplessness.*

14. *Apart from the above, the following some categories of cases 'which will be entertained;*

a) *For protection of the neglected children.*

b) *Non-payment of minimum wages to workers and exploitation of casual workers complaints of violation of labour laws (except in individual case).*

c) *Petitions complaining death in jail or police custody; or caused by law; enforcing agencies.*

d) *Petitions against law enforcing agencies for refusing to register a case despite there are existing allegations of commission of cognizable offences.*

e) *Petitions against atrocities on women such as, bride burning, rape, murder for dowry, kidnapping.*

f) *Petitions complaining harassment or torture of citizens by police or other law enforcing agencies.*

g) Petitions pertaining to environmental pollution, disturbance of ecological balance, drugs, food adulteration, maintenance or heritage and culture, antiques, forest and wild life.

h) Petitions from riot victions.

In the case of AFM Shah Alam vs. Mujibul Huq & ors reported in 41 DLR (AD) (1989) 68 wherein it is held,

"Reading the entire law and the rules we have come to this conclusion that the real and larger issue is completion of free and fair election with rigorous promptitude. Hence, election being a long elaborate and complicated process for the purposes of electing public representatives it is not possible to lay down guidelines by any court because all the exigencies cannot be conceived humanly nor the vagaries of people contesting the election can be fathomed. In a dispute the issue is to be raised and evidence adduced for adjudication by a competent Tribunal. This function has been given to the Election Tribunal and to nowhere else. The Election Commission has been given power to decide certain matters but such enquiry will not come within the purview of judicial enquiry because the power to decide judicially is different from deciding administratively. By taking resort to extraordinary jurisdiction for a writ the High Court Division will be asked to enter into a territory which is beset with the disputed facts and

certainly by well settled principles it is clear a writ court will not enter into such controversy."

"The jurisdiction of the High Court Division under Article 102 of the Constitution cannot be invoked except on the very limited ground of total absence of jurisdiction (Coram non-judice) or malice in law to challenge any step in the process of election including an order passed by the Election Commission under Rule 70 because:

(a) ……

(b) ……

(c) Almost invariably there will arise dispute over facts which cannot and should not be decided in an extraordinary and summary jurisdiction of writ."

In addition to the decisions referred to above of our apex Court, we may rely the rest part of the Judgment in the case of Kurapati Maria Das vs. M/S. Dr.Ambedkar Seva Samajan in Supreme Court of India Civil Appeal No.2617 of 2009 (arising out of SLP (Civil) No.15144 of 2007).

"We are afraid, we are not in position to agree with the contention that the case of K. Venkatachalam vs. A Swamickan & anr. [1999 (4) SCC 526] is applicable to the present situation. Here the appellant had very specifically asserted in his counter affidavit that he did not belong to the Christian religion and that he further asserted that he was a person belonging to the scheduled Caste. Therefore, the Caste status of the appellant was a

disputed question of fact depending upon the evidence. Such was not the case in K. Venkatachalam vs. A Swamikan & Anr. [1999(4) SCC 526] Every case is an authority for what is actually decided in that. We do not find any general proposition that eve where there is a specific remedy of filing an Election petition and even when there is a disputed question of fact regarding the caste of a person who has been elected from the reserved constituency still remedy of writ petition under Article 226 would be available.

Shri Guipta, however, further argued that in the present case what was prayed for was a writ of quo-warranto and in fact the election of the appellant was not called in question. It was argued that since the writ petitioners came to know about the appellant not belonging to the Scheduled Caste and since the post of the Chairperson was reserved only for the scheduled caste, therefore, the High Court was justified in entering into that question as to whether he really belongs to scheduled cast. In short, the learned counsel argued that independent of the election of the appellant as a ward member or as a chairperson; his caste itself was questioned in the writ petition only with the objective to see whether he could continue as the chairperson. This argument is clearly incorrect as the continuance of the appellant as the chairperson was not dependent upon something which was posterior to the appellant's election as chairperson. It is not as if some event had

taken place after the election of the appellant which created a disqualification in appellant to continue as the firstly, as a ward member and secondly as the chairperson which election was available only to the person belonging to the scheduled caste and so, also the post of chairperson. Therefore, though indirectly worded, what was in challenge in reality was the validity of the election of the appellant. According to the writ petitioners, firstly the appellant could not have elected as a ward member nor could he be elected as the chairperson as he did not belong to the scheduled caste. We can understand the eventually where a person who is elected as a scheduled caste candidate, renounces his caste after the elections by conversion to some other religion. Then it is not the election of such person which would be in challenge but his subsequently continuing in his capacity as a person belonging to a particular caste. This counsel for the appellant rightly urged that the question of caste and the election are so inextricably connected that they cannot be separated. Therefore, when the writ petitioners challenged the continuation of the appellant on the ground of his not belonging to a particular caste what they in fact challenged is the appellant on the ground of his not belonging to a particular caste what they in fact challenged is the appellant on the ground of his not belonging to a particular caste what they in fact challenged is the validity of the election of the appellant, though

apparently the petition is for the writ of quo-warranto.

The Counsel for the appellant rightly urged that the question of caste and the election are so inextricably connected that they cannot be separated. Therefore, when the writ petitioners challenged the continuation of the appellant on the ground of his not belonging to a particular caste what they in fact challenged is the validity of the election of the appellant, though apparently the petition is for the writ of quo-warranto.

In conclusion their Lordships held, ‘‘Under such circumstances, we do not think that the High Court could have decided that question of fact which was very seriously disputed by the appellant. It seems that in this case, the High Court has gone out of its way, firstly in relying on the Xerox copies of the service records of the appellants and then at the appellate stage, in calling the first of the Electricity Board where the appellant was working . This amounted to a roving enquiry into the caste of the appellant which was certainly not permissible in writ jurisdiction and also in the wake of Section 5 of 1993 Act.”

Again merely because the appellant was described as being a Christian in the service records did not mean that he appellant was actually a person professing Christian religion. It was not after all known as to who had given those details and further

as to whether the details, in reality, were truthful or not. It would be unnecessary for us to go into the aspect whether the petitioner in reality is a Christian for the simple reason that this issue was never raised at the time of his election. Again the appellant still holds the valid caste certificates in his favor declaring him to be belonging to Scheduled Caste and further the appellant's status as the Scheduled Caste was never cancelled before the authority under the 1993 Act which alone had the jurisdiction to do the same. If it was not for High Court to entire into the disputed question of fact regarding the caste status of the appellant, the findings recorded by it on that question would lose all its relevance and importance. There is one more peculiar fact which we must note. It has come in the judgment of the learned Single Judge as also in the Division Bench that the appellant 'converted' to Christianity. Now, it was not nobody's case that the petitioner ever was converted nor was it anybody's case as to when such conversion took place, if at all it took place. All the observations by the learned Single Judge regarding the conversion of the appellant to Christianity are, therefore, without any basis, more particularly, in view of the strong denial by the appellant that he never converted to Christianity. Again the question whether the petitioner loses his status as Scheduled Caste because of his conversion is also not free from doubt in view of a few pronouncements of this Court

on this issue. However, we will not go into that question as it is not necessary for us to go into that question in the facts of this case.

It was further held that, "If it was for High Court to enter into the disputed question of fact regarding the caste status of the appellant, the findings recorded by it on that question would lose all its relevance and importance."

Be that as it may, in our opinion, the High Court clearly erred firstly, entertaining the writ petition, secondly in going into the disputed question of fact regarding the caste status, thirdly, in holding that the appellant did not belong to the Scheduled Caste and fourthly, in allowing the writ petition.

We, therefore, allow this appeal by setting aside two judgments one of the learned Single Judge and the other of the Division Bench of the High Court filed in appeal and direct the dismissal of the writ petition."

In the case of New India Tea Company Ltd. vs. Bangladesh and others reported in 31 DLR(AD) (1979) 303 wherein it is held,

"Mr. S.R. Pal, Counsel for the appellant, submitted that the learned Judges of the High Court were wrong in deciding the disputed question of facts relating to title to the land which could only have been done by taking proper evidence, oral and documentary. Whether the relinquishment by Hiralal

Mukherjee, Manager of Ramgarh Tea Estate in whose favour the land was originally settled legally transferred title in favour of the Union Agency Ltd. depended on the decision as to whether a registered document was necessary to effect the relinquishment. The learned Counsel also submitted that the decision as to whether the Union Agency Ltd. was a part and parcel of the appellant-company required investigation into facts. It appears that the High Court did not believe the genuineness of the rent receipt dated 25.3.67 produced by the appellant-company in support of its claim that rent was being paid by the company to the Government and it also found discrepancies with respect to the Khatian number mentioned in the rent receipt. The land in dispute was recorded as Khatian No.1/36 after the mutation case No.2/1, whereas the rent receipt showed that rent was being paid in respect of land in Khatian No.1/38. Further, there was no reason as to why the appellant-company whose name was not recorded in the Khatian should pay rent in respect of the land of which M/s. Union Agency Ltd. was the recorded tenant. The questions raised by the learned Counsel relate to the title of the appellant-company which depend on facts which are in dispute and can only be settled after full evidence has been properly taken. Mr. Sultan Hossain Khan, the learned Deputy Attorney General who appeared on behalf of the Government also conceded that where facts are

disputed; the High Court, in exercising jurisdiction under Article 102 of the Constitution should not proceed to settle the disputed facts requiring taking of evidence. There is a long line of decisions in favour of the view that the High Court should not enter into disputed questions of fact nor decide any question as to title which require investigation into facts and taking of elaborate evidence."

I have also examined the decisions as referred by the learned counsel for the petitioner. On perusal of the same I am of the view that since the Writ Petition is itself not maintainable because of the disputed question of fact as such these are not relevant or considerable in any manner.

Regarding writ of quo warranto the fundamental Rule is that the petition has to be in greater public interest. Any such attempt for securing private interest cannot be encouraged. In the case in hand it has been revealed that the petitioner has far reaching personal interest and intends to use this as weapon to defeat his political rival. Apart from that it is now a well settled proposition of law is that if there is any alternative remedy available no writ petition even in the form of quo warranto is liable to be maintained.

The proceeding under Art. 102(2) of the Constitution is a summary one and it is decided on the statements made on

affidavits filed by the parties and the documents annexed to the application and the affidavit-in-opposition. Hence it is often held that the court will decline to exercise jurisdiction when the application involves resolution of disputed question of fact. The decision reported in 42 DLR(AD) 13 lends support to the above contention. In this summary proceeding examination of disputed question of fact which is a complicated in nature and as a general rule cannot be undertaken nor investigation of title to property made and it is neither desirable nor advisable to enter into the merit and record a finding as to disputed question of fact. The decision reported in 51 DLR (AD) 232 lends support to the above order. The court will neither decide the complicated question of title nor disputed questions of fact relating to damages or compensation.

The rule is that the court will decline to exercise the jurisdiction only when the dispute as regards facts is such that the dispute cannot be reasonably resolved on the facts pleaded and documents produced before the court. The decision reported in 19 DLR (SC) 228 lends support to the above order.

In the instant writ petition it clearly transpires that the contentions as raised by the parties can only be determined by adjudication of the factual aspects and for that a detailed

investigation is requires which includes examination of evidence as well as examination of witnesses. The contentions as raised thus are highly disputed question of facts which in the line of the above authorities cannot be adjudicated in a summary proceedings under Article 102 of the Constitution of the republic.

Considering the facts and circumstances, discussion made hereinabove as well as the decisions as referred to, I am of the view that the instant writ petition is not maintainable.

Accordingly the Rule is discharged. However, there will be no order as to cost.

(Md. Abu Zafor Siddique,J)

Mostafa/B.O.
Sohag/B.O.